A VINDICATION OF THE RIGHT OF ELECTION, AGAINST THE DISABLING POWER OF THE HOUSE OF COMMONS;

SHEWING THAT POWER TO BE CONTRARY TO THE PRINCIPLES OF THE CONSTITUTION, INCONSISTENT WITH THE RIGHTS OF THE ELECTORS, AND NOT WARRANTED BY THE LAW AND USAGE OF PARLIAMENT.

IN WHICH IS INCLUDED OBSERVATIONS on the POWER of EXPULSION.

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M,DCC,LXIX.

A

VINDICATION

OF THE

RIGHT OF ELECTION, &c.

I Entirely agree with an honourable member of the Houſe of Commons, who declared in that aſſembly, that, in his opinion, the ſubjects of debate before the convention parliament at the Revolution were not more important than the queſtion brought before the Houſe by the Petition of the Freeholders of Middleſex.

Being early led, by particular circumſtances, to a very attentive conſideration of this queſtion, and having ſpent a good deal of time and labor in ſearching for and conſulting the precedents, I think it my duty to give the Public the reaſons of that clear and full conviction, which has been reſult of my enquiries, on a ſubject in which every individual is ſo deeply concerned.

If my judgment is erroneous, that Error will be more eaſily refuted by being publiſh'd to the world; if well grounded, it is of the greateſt conſequence to communicate the

grounds of it to the whole kingdom, that every man in it may be apprized of the ineſtimable value of that right, which I conceive to have been ſo eſſentially violated.

Tho' this ſubject has been already much agitated, tho' it has been touched by the maſterly pen of Junius, and very ably diſcuſſed by a reſpectable Member of the Houſe, in a letter to one of his conſtituents, yet its uncommon importance will, I hope, be an apology for this publication, as different modes of reaſoning may be neceſſary to render the queſtion clear, and carry full conviction to different capacities; and repeated efforts may be required to awaken the attention of the public, as the violation is of a nature the conſequences of which, however fatal to the liberties of this kingdom, cannot immediately be ſenſibly felt.

Mankind are ever more ſtrongly affected by ſenſible impreſſions, than by abſtract reaſonings.

When people's lives are endangered by unjuſt violence, their houſes broken open, their perſons impriſoned, and their property torn from them by the lawleſs hand of oppreſſion, their ſenſes immediately convince them, that their liberty is invaded, and their ſecurity deſtroyed.

But when, by leſs violent methods, the general fundamental principles of the conſtitution are ſhaken or ſubverted, tho' the conſequent evils may be not leſs dreadful than thoſe before-mentioned, yet, if they are ſomewhat remote,

remote, and the deductions of a long chain of reaſoning are neceſſary to point them out, the bulk of the people are often ignorant or regardleſs of them; they are lulled into a fatal ſecurity by the exemption from preſent and ſenſible inconveniences, and when at length, perhaps too late, they begin to feel the effects of their inattention, they are only awakened to a fruitleſs regret and deſpair, by finding their liberty irrecoverably loſt.

In the preſent caſe, I do not ſuppoſe there is a ſingle Freeholder of Middleſex who does not find himſelf as much maſter of his property, and as free from any perſonal reſtraint or violence, ſince the Houſe of Commons determined Colonel Lutterell duly elected, as he was before; and yet I will venture to affirm, ſhould that determination be received and handed down to poſterity as law, that not only the Freeholders of Middleſex, but all the inhabitants of this iſland, will hold their fortunes, liberties and lives at the will of a ſet of men, independent of, and no longer choſen by themſelves.

The Right of Election is the very baſis and foundation of the popular part of our conſtitution; it is the firſt of all the rights of the people of this realm, more important than the rights of property, or even of perſonal ſafety from reſtraint or violence; indeed it is, properly ſpeaking, their only right, as it is upon that alone that all the reſt depend, and without which they cannot exiſt in ſecurity a moment.

To make this more clear, it will be neceſſary briefly to conſider the nature of civil government in general, and of our conſtitution in particular.

In every ſociety there muſt of neceſſity be, ſomewhere or other, a power abſolute and ſupreme, ſuperior even to the laws, namely, the power by which thoſe laws are made, and from whence they derive their authority. The political liberty, therefore, of any ſtate, depends wholly on the hands in which that power is lodged, and is proportionable to the ſhare the body of the people have in the legiſlature.

Whatever perſonal rights and privileges the inhabitants of any country may enjoy at a particular period, if a ſingle new law can be made, or old one repealed or altered, without their conſent, they are truly and abſolutely ſlaves, tho' for a time they may not feel their chains, and their phantom of liberty may in a moment be diſſolved in air, by the breath of that power on which the being of their laws depends.

This ſupreme aud tranſcendent power of legiſlation, by the ancient conſtitution of this kingdom, is veſted in the King, an hereditary body of Nobles, and the Commons of the Realm.

Had the body of the people been excluded from this legiſlative aſſembly, they would, as I have already obſerved, have been entirely ſlaves; but, from the greatneſs of this kingdom,

dom, it was impoſſible for them actually to exerciſe in their own perſons thoſe rights which were inherent in them by the laws of Nature, and of which no legal conſtitution could ever deprive them; they were therefore of neceſſity obliged to have recourſe to repreſentation, and delegate their rights and powers to a certain number choſen by, and from amongſt themſelves, reſerving *only the right of chuſing* to whom they ſhould commit this moſt important truſt. Every perſonal right, privilege or franchiſe, muſt neceſſarily be ſubject to the controul of the ſupreme legiſlature, when once eſtabliſhed; the only ſecurity, therefore, which the people of this realm ever have had, or ever can have, for the enjoyment of their deareſt rights and privileges, conſiſts in the right of chuſing the perſons who ſhall compoſe one branch of the legiſlature; and the only tye they have that thoſe perſons ſhall not abuſe their truſt, is the ſame right of repeated election, for the repreſentatives are not, by any law, accountable to their conſtituents for their conduct.

This right therefore ſhould ever be held the moſt ſacred and inviolable of all others; and I very much doubt whether even the whole legiſlature (which is clearly, in every other matter, ſupreme and abſolute) can totally take it away from any body of men in whom it has been veſted by the ancient conſtitution, for it is the exerciſe of that right alone from whence

one

one branch of the legiſlature itſelf derives its whole authority.

The intention of the following ſheets is to vindicate this right againſt all the arguments which have been uſed to ſubvert it; and ſo ſtrong is my own conviction, that, if I fail in the attempt, I ſhall, in deſpite of ſelf-flattery, impute it rather to the weakneſs of the advocate than of the cauſe.

Tho' the public in general are already poſſeſſed of the facts, I ſhall begin with a recital of the whole proceedings relative to the late election for the county of Middleſex, as it is abſolutely neceſſary for a thorough underſtanding of the queſtion; and I rather chuſe to lay the whole before my readers, at one view, than to give them the trouble of referring to the votes of the Houſe of Commons, or other publications which may not be at hand.

I propoſe to conſider the whole of theſe proceedings from firſt to laſt, and to ſhew that the Houſe of Commons have exceeded the legal powers delegated to them by their Conſtituents, and that their final determination of the 8th of May laſt, was neither warranted by the principles of the conſtitution, the common or ſtatute law of the kingdom, the law and uſage of parliament, or even by any ſingle precedent in their own journals.

On the 29th of March 1768, John Wilkes, Eſq; was elected a Knight of the Shire for the County of Middleſex. On the 3d of February 1769, the Houſe of Commons reſolved,

" That

" That John Wilkes, Esq; a Member of " this House, who hath, at the bar of this " House, confessed himself to be the Author " and Publisher of what this House has re- " solved to be an insolent, scandalous, and se- " ditious Libel, and *who has been convicted in* " *the Court of King's-Bench, of having printed* " *and published a seditious Libel, and three ob-* " *scene and impious Libels*, and, by the judg- " ment of the said Court, has been sentenced " to undergo twenty-two months imprison- " ment, and is now in execution under the " said judgment, be expelled this House. "

" Ordered, That Mr. Speaker do issue his " warrant to the Clerk of the Crown, to make " out a new writ for the electing of a Knight " of the Shire, to serve in this present Parlia- " ment, for the county of Middlesex, in the " room of John Wilkes, Esq; *expelled this* " *House.*"

A writ issued accordingly, and on the 16th of February 1769, Mr. Wilkes was unanimously reëlected by the Freeholders of Middlesex.

On the 17th of the same month *the House of Commons ordered,*

" *That the Deputy Clerk of the Crown do* " *attend immediately, with the Return* to the " writ for electing a Knight of the Shire, to " serve in this present Parliament, for the " county of Middlesex, in the room of John " Wilkes, Esq; expelled this House."

" And

"And the Deputy Clerk of the Crown "attending according to order, the ſaid writ "and return were read.

"A motion was made, and the queſtion "propoſed, That John Wilkes, Eſq; *having "been in this ſeſſion of Parliament expelled this "Houſe, was, and is, incapable of being elected* "a Member, to ſerve in this preſent Parlia- "ment.

"The Houſe was moved, that the entry in "the journal of the Houſe, of the 6 Mar. "1711, in relation to the proceedings of the "Houſe upon the return of a Burgeſs, to ſerve "in Parliament, for the borough of King's "Lynn, in the county of Norfolk, in the "room of Robert Walpole, Eſq; expelled the "Houſe, might be read; and the ſame was "read accordingly.

"The Houſe was alſo moved, that the re- "ſolution of the Houſe, of 3 Feb. inſtant, "relating to the expulſion of John Wilkes, "Eſquire, then a Member of this Houſe, "might be read, and it was read accordingly.

"Reſolved,

"That John Wilkes, Eſq; *having been, in "this ſeſſion of Parliament, expelled this Houſe, "was, and is, incapable of being elected* a "Member, to ſerve in this preſent Parliament."

The Houſe being informed that there was no other candidate at the election,

"Reſolved,

"That the late election of a Knight of "the Shire, to ſerve in this preſent Parlia- "ment,

" ment, for the county of Middleſex, is a " void election."

" Ordered, That Mr. Speaker do iſſue his " warrant to the Clerk of the Crown, to make " out a new writ for electing of a Knight of " the Shire, to ſerve in this preſent Parliament, " for the county of Middleſex, in the room of " John Wilkes, Eſq; *who is adjudged incapable of being elected* a member to ſerve in " this preſent Parliament, and whoſe election " for the ſaid county has been declared void."

On the 16th of March Mr. Wilkes was again elected, and

On the 17th of the ſame month the Houſe of Commons *(calling as before for the Return,* and finding Mr. Wilkes again returned) upon reading the entry of the 17th of February, and being informed that there was no other candidate but Mr. Wilkes,

" Reſolved,

" That *the Election and Return of John " Wilkes,* Eſq; *who hath been by this Houſe " adjudged incapable* of being elected a Mem- " ber to ſerve in this preſent Parliament, *are " null and void,*"

" Ordered, That Mr. Speaker do iſſue his " warrant to the Clerk of the Crown, to make " out a new writ for the electing of a Knight " of the Shire, &c. for the county of Mid- " dleſex, in the room of John Wilkes, Eſq; " *who hath been adjudged incapable* of being " elected a Member to ſerve in this preſent

" Parliament, and whoſe Election and Return " have been declared null and void."

At the execution of this writ on the 13th of April, four candidates offered themſelves, namely, Mr. Wilkes, Colonel Lutterell, Serjeant Whitaker, and Captain Roche. The numbers upon the poll were,

For John Wilkes, Eſq; - -	1143	Majority
Henry Lawes Lutterell, Eſq;	296	847
William Whitaker, Eſq; -	5	
David Roche, Eſq; - -	0	

Accordingly Mr. Wilkes was a fourth time returned.

On the 14th of April the Houſe, *as before, called for the Return*, and, on reading the entries of the 17th of February,

" Reſolved,

" That the Election and Return of John " Wilkes, Eſq; to ſerve in this preſent Parlia- " ment for the ſaid county, are null and void."

Then *They called in the Sheriffs, and having got from them the ſtate of the poll*, they adjourned the conſideration of it to the next day.

On that day, April 15 (on reading the entries in the journals of the 20th of May 1715, touching the election for the borough of Malden, the ſtatute of 9th of Anne, entituled An act for ſecuring the freedom of Parliaments, by the further qualifying the Members to ſit in the Houſe of Commons; and the entries of the 2d and 14th of February 1727, and 16th of April 1728, in relation to the election for the

the town of Bedford, and 23d of February and 6th of March 1711, in relation to the election for the borough of King's-Lynn) it was

" Reſolved, That Henry Lawes Lutterell, " Eſq; *ought to have been returned a Knight* " *of the Shire*, to ſerve in this preſent Parlia- " ment, for the county of Middleſex.

" Ordered, That the Deputy Clerk of the " Crown do amend the Return for the county " of Middleſex, by raſing out the name of " John Wilkes, Eſq; and inſerting the name " of Henry Lawes Lutterell, Eſq; inſtead " thereof."

" Ordered, That leave be given to petition " this Houſe, touching the Election of Henry " Lawes Lutterell, Eſq; within fourteen days next."

Purſuant to this leave, on the 29th of April Sir George Saville preſented to the Houſe the following Petition from the Freeholders of Middleſex.

" To the honourable the Commons of Great " Britain, in Parliament aſſembled.

" The humble Petition of the Freeholders of the County of Middleſex,

" Sheweth,

" That your Petitioners being informed, by " the votes of this honorable Houſe, that the " Return for the ſaid County of Middleſex " hath been amended, by raſing out the name " of John Wilkes, Eſq; and inſerting the name " of Henry Lawes Lutterell, Eſq; inſtead " thereof; and that leave was given to peti-

" tion this Houſe, touching the Election of " the ſaid Henry Lawes Lutterell, Eſq;

" Your Petitioners, in conſequence thereof, " beg leave to repreſent to this honorable " Houſe, that the ſaid Henry Lawes Lutterell " had not the Majority of legal Votes at the " ſaid Election; nor did the Majority of the " Freeholders, when they voted for John " Wilkes, Eſq; mean thereby to throw away " their votes, or to wave their Right of Re- " preſentation; nor would they, by any " means, have choſen to be repreſented by " the ſaid Henry Lawes Lutterell, Eſq; Your " Petitioners therefore apprehend, he cannot " ſit as the Repreſentative of the ſaid County " in Parliament, without manifeſt infringe- " ment of the Rights and Privileges of the " Freeholders thereof.

" Your Petitioners humbly hope that this " honorable Houſe will give leave that they " may be heard by their Counſel againſt the " ſaid Election and Return, and grant them " ſuch further relief as they, in their wiſdom " and juſtice, ſhall think meet."

Upon this the Houſe ordered, that the merits of this petition (as touching *the Election* of the ſaid Henry Lawes Lutterell, Eſq;) ſhould be heard at the bar of the Houſe on Monday the 8th of May.

From the reſtriction in this order, it was apprehended that the Counſel for the Petitioners would have been precluded from queſtioning *the Return*; but on the 8th of May they went into

into the whole merits of the caſe, and were not interrupted by the Houſe, who nevertheleſs upon that hearing

" Reſolved, That Henry Lawes Lutterell, " Eſq; *is duly elected* a Knight of the Shire, " to ſerve in the preſent Parliament, for the " County of Middleſex."

On this ſtate of the proceedings, the firſt thing that offers itſelf to our conſideration is, *The Power of Expulſion in the Houſe of Commons*; the expulſion of Mr. Wilkes, on the 3d of February 1769, being that on which all the ſubſequent proceedings were founded.

That the Houſe of Commons is at this day poſſeſſed of a power of expelling its own Members, *on juſt and ſufficient grounds*, cannot be controverted, and I believe it has never been denied. Tho' the exerciſe of this power has not been ſo ancient, as to eſtabliſh a uſage contrary to the general principles of our conſtitution and laws (the firſt inſtance being in 1580*) yet, in a country where precedents have always had ſo great an authority, a continued ſeries of them, even from that time, is abundantly ſufficient to eſtabliſh a power which is founded in reaſon, and perfectly conſiſtent with the principles of the conſtitution.

When I ſay this of *the Power of Expulſion*, I do not mean *an arbitrary Power*. Such a power can never be founded in reaſon, or conſiſtent with the principles of any regular conſtitution; ſuch a power, in this country, does

* Feb. 14. The caſe of Arthur Hall.

does not, cannot exiſt, even in the legiſlature. The legiſlature is *ſovereign* and *ſupreme*, but it is not *arbitrary*; there is a bound to all its determinations, a limit which it cannot tranſgreſs, The laws of God and Nature, the immutable principles of Juſtice and Right. But, thanks to heaven, and to the wiſdom and valor of our anceſtors! *every other power* in this kingdom is reduced within ſtill narrower bounds; it has the limit already mentioned, and it has another not leſs inviolable ſuperadded to that: it muſt be *conformable to the general eſtabliſhed laws and conſtitution* of the kingdom, and every exerciſe of it muſt be *conſiſtent not only with the natural, but with the political and civil rights of every individual in this realm.*

In all well-regulated governments, the powers and privileges of every individual, and every body of men, muſt be perfectly compatible and conſiſtent with each other. That ſtate where a power can exiſt in one man, or body of men, ſubverſive of the *legal* rights or privileges of another, is not a regular government, is not a civil ſociety, but a wild confuſed chaos of abſurdities and contradictions.

Let us then examine *the Power of Expulſion* by this Rule, let us ſee how far it is conſiſtent with the *legal Rights and Privileges* of the people of Great-Britain, and we ſhall be enabled to judge whether the particular exerciſe of it, which is now in queſtion, has been confined

confined within thoſe limits which no power upon earth can legally tranſgreſs.

The Right of electing * Repreſentatives, who were to act for them in the diſpoſal of their Fortunes, Liberties and Lives, has been veſted in the Freeholders of the different counties in this kingdom, from time beyond memory of man: it is *a common-law Right*, derived originally from the laws of God and Nature, coëval with the conſtitution itſelf, and prior even to the antiquity of the Houſe of Commons; for it was the exerciſe of this Right, from whence that Houſe derived its firſt exiſtence.

The following are the words of that ornament of the courts of juſtice and glory of his country, Lord Chief Juſtice Holt.

" The Election of Knights † belongs to the " Freeholders of the Counties, and it is an " *original Right*, veſted in and *inſeparable* " *from the Freehold, and can no more be ſevered* " *from their Freehold, than their Freehold itſelf* " *can be taken away.*"

At what time the Freeholders of the counties firſt began to exerciſe this right, by ſending diſtinct Repreſentatives for their ſeveral counties,

* In ſpeaking of the Right of Election, I ſhall purpoſely confine myſelf to that of counties; for tho' the right of every Burgeſs in the kingdom is equally ſacred, and equally affected by the preſent queſtion, yet, as it would lead me into too great length to examine into the nature and origin of them all, I ſhall content myſelf with that which is the immediate ſubject of the preſent diſpute.

† Lord Raymond, 950.

counties, is not certain. We find them poſſeſſed of it *ſo long ago as the year* 1254, the 38th of Hen. III. the writs ſent to the Sheriffs in that year (being ſtill extant) "directing "them to return two legal and diſcreet "Knights, *choſen by the reſt* in each county, "*to act in behalf of them all*, &c." *

This Right, thus derived from the common law, and founded in the principles of natural juſtice, has been repeatedly recognized and confirmed by the Legiſlature, in the ſeveral acts of Parliament which have been made to regulate it †.

The Right of Election, thus *eſtabliſhed both by the Common and Statute Law*, neceſſarily implies in it *an excluſive Right of judging as to the Fitneſs or Unfitneſs* of the perſons to be elected. This is ſo clear and ſelf-evident, that I know of no argument or explanation which can illuſtrate or enforce it. Indeed the Right of *Election*, and of *judging of the perſons to be elected*, are one and the ſame; and that it is *an excluſive Right* appears from this, That the conſent of no other perſon, but the Freeholders of the county, is required by law to render the election of a Knight of the Shire compleat and valid. If ſuch conſent was required, that perſon would be a Sharer in the Right of Election.

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* See Parliamentary Hiſtory, Vol. I. p. 54.

† See 7th Hen. IV. ch. 15.—1ſt Hen. V. ch. 1.—8th Hen. VI. ch. 7.—10th Hen. VI. ch. 2. and many later ſtatutes.

The Freeholders therefore of the different counties (and all the other Electors) in this kingdom, have an abſolute, excluſive, *legal Right*, to judge of the Fitneſs and Unfitneſs of the ſeveral Candidates who offer themſelves, and to elect which of them they pleaſe to repreſent them in Parliament, not being, at the time of ſuch election, diſqualify'd by any known law.

Having already obſerved that the exerciſe of every power in a well-regulated ſtate muſt be conſiſtent with the legal rights of every individual in that ſtate, we are now, by direct and neceſſary conſequence, poſſeſſed of one Rule applicable to *the Power of Expulſion* in the Houſe of Commons, and that is

That the exerciſe of it *muſt be conſiſtent with the Right of Election*, veſted in the people by the laws and conſtitution of the kingdom.

To be conſiſtent with the Right of Election, it muſt be for an offence *either ſubſequent to the election*, or *of which the Electors might be preſumed to be ignorant at the time of ſuch election.*

For, if the expulſion be for an offence *prior to the election*, and *known to the Electors at the time*, is it not ſaying that the perſon expelled *was, at the time of his election, unfit* to repreſent the people who choſe him? And is not this ſubſtituting the Houſe of Commons in the place of the Electors, and making them the *Judges of the Fitneſs and Unfitneſs* of the perſons to be elected? Is it not, in fact, giving them a

negative voice in every election, and thus ſubverting the legal Right which we have already ſhewn to be veſted by the conſtitution in the Electors?

Subject to this reſtriction, the power in queſtion is perfectly conſiſtent with every right of the Electors, nay, it compleats and renders them more perfect; it is not only conſtitutional, but neceſſary for the ſupport of the honor and dignity of the Houſe, and of the rights and privileges of their Conſtituents.

Whenever any body of Electors have made their election, and filled the vacancy for that county or borough, they have, for that time, completely exerciſed their power, and their right is totally ſuſpended till a vacancy again happens. The law gives them no power, in any caſe whatſoever, to vacate the ſeat which they have filled; and the wiſdom of the law, in withholding ſuch a power, might be juſtify'd by very cogent reaſons. Suppoſe then that the perſon whom they have choſen ſhould abuſe his truſt, or that they ſhould find ſome reaſon, unknown to them at the time of the election, which would have made them leſs willing to have repoſed that truſt in his hands. Should the Electors, in ſuch a caſe, be without remedy? Should the exerciſe of all their rights, for perhaps ſeven years, be delegated to a perſon in whom they can place no confidence? By no means: the conſtitution has provided a remedy. The Repreſentatives of the People have a right to interpoſe *in behalf of their Conſtituents*;

Conſtituents; they are the witneſſes and the proper judges of the conduct of their Members after they come amongſt them. If any one therefore renders himſelf unworthy of the great and important truſt which has been repoſed in him, by his *ſubſequent conduct*, or if the Houſe have reaſon to think that the Electors have been eſſentially *deceived* in their choice, they both can and ought to expel him. By doing ſo they declare their opinion; they paſs a ſevere and diſgraceful cenſure on the offender; they vacate the ſeat, and by that means *reſtore to the people the Right of Election*, enabling them to *reconſider* their choice, and proceed to a new election, with the knowledge of thoſe circumſtances relative to their late Member, upon which they are to form their judgment.

In caſe of an expulſion, *ſuch as this*, there will be little danger of a re-election; and I am warranted in ſaying ſo, as well by experience as the reaſon of the thing. Yet if the Electors, thus cognizant of all the circumſtances, do ſtill think the expelled Member, as he ſtands before them at the time of the election (not being diſqualify'd by any known law) fit to be entruſted as their Repreſentative, they have, in my opinion, an undoubted right to re-elect him; and I hope to prove, when I come to ſpeak of the Doctrine of Incapacity, that there is no law in this kingdom to prevent them from doing ſo.

The Electors of this kingdom are, by the conſtitution, the ſole Judges of the Fitneſs of

any perſon to repreſent them; and they ought to be ſo, for it is *their Rights and Powers* which that Repreſentative is to exerciſe, *their Privileges* which he is to protect, and *their Fortunes, Liberties and Lives,* of which he is (in concurrence with the other branches of the Legiſlature) to have the Diſpoſal.

The Stat. 6 of Anne, ch. 7. is a ſtrong confirmation of this idea of expulſion. It enacts, That,

" If any perſon, *being choſen a Member* of " the Houſe of Commons, ſhall accept of " any office of profit from the Crown, *during* " *ſuch time as he ſhall continue a* Member, his " Election ſhall be, and is hereby declared to " be void, and a new writ ſhall iſſue for a " new Election, as if ſuch perſon ſo accepting " was naturally dead. *Nevertheleſs ſuch per-* " *ſon ſhall be capable of being again elected,* as " if his place had not become void as afore- " ſaid."

I conſider this Statute as a *Legiſlative Expulſion,* and in that light it is perfectly conformable to the principles above laid down. The cauſe is *ſubſequent to the Election,* for it is " If any perſon, *being elected,* &c. ſhall accept" An acceptance of an office, *prior to the Election,* does not, by this Statute, vacate the ſeat. And why does it not, for it ſurely has the ſame influence on the party at one time as at another? Becauſe *the Electors, at the time of the election, knew* that the perſon was poſſeſſed of that office, and yet judged him fit to repreſent them.

And

And therefore the Statute goes on to ſay, that (after this notification to the Electors, by vacating his ſeat) he is " nevertheleſs capable of " being again elected." The Legiſlature judged the acceptance of an office from the Crown, a circumſtance which made it neceſſary to give the Electors an opportunity of reconſidering their choice, *with a very wholeſome admonition of the impropriety of it.* Yet, if they ſtill have ſuch an opinion of the perſon, whether well or ill founded, as to perſiſt in that Choice, the Statute acknowledges and confirms their Right of doing it.

The ſame Statute furniſhes an anſwer to thoſe who may object to my idea, that it renders the Power of Expulſion in the Houſe of Commons nugatory. To their judgment I will oppoſe that of the whole Legiſlature, who never would have made the Statute in queſtion had they been of that opinion; for it is obvious that it conforms, in every circumſtance, to this idea of Expulſion. Beſides this, whoever will be at the pains of turning back to page 18 and 19, will ſee that this power, thus limited, is ſo far from being nugatory, that it is both uſeful and neceſſary.

As little do I agree with thoſe who declaim on the danger of the people returning improper Members, if their judgment is concluſive. The great Monteſquieu ſays* " The people " are extreamly well qualify'd for chuſing " thoſe whom they are to entruſt with part of " their

* B. II. ch. 2.

" their authority. They have only to be de-
" termined by things which they cannot be
" ſtrangers to, and by facts that are obvious to
" ſenſe." And again in the ſame chapter,
" Should we doubt of the people's natural
" ability in reſpect to the diſcernment of me-
" rit, we need only caſt an eye on the conti-
" nual ſeries of ſurprizing elections made by
" the Athenians and Romans, which no one
" ſurely will attribute to hazard."

Of the ſame opinion with this great politi-cian were our anceſtors, who entruſted the Right of Election to thoſe of the people who now poſſeſs it, at a very remote period of antiquity, and have, for ſo many ſucceſſive ages, continued it in the ſame hands.

But this objection admits a ſtill fuller anſwer, which is this, That, let the perſon elected be ever ſo unfit for the truſt repoſed in him, the public can receive very little detriment, if he never abuſes that truſt, or commits any offence ſubſequent to his election: if he does, it has already been admitted that the Houſe of Commons have power to expel him. And it is a degree of madneſs not to be imputed to human beings, much leſs to any body of men in whom the Conſtitution has veſted the Right of Election, to perſiſt in repeatedly re-electing a man, who, *after every election*, abuſes his truſt, or does *ſomething new* to render him unworthy of it.

If even this ſhould happen, if ſome one body of Electors ſhould be ſo infatuated (which is a ſuppoſition

ſuppoſition barely poſſible) yet ſtill the publie would be ſafe, as nothing can be done in the Houſe of Commons but by a majority; and it is therefore better for the commonwealth, that one, two, or even twenty improper Members ſhould ſit in the Houſe of Commons, than that a Right of the People, ſo important as that of Election, ſhould, in the ſmalleſt degree, be violated or infringed.

In the vote of the Houſe of Commons of the 3d of February 1769, one of the grounds aſſigned for the Expulſion of Mr. Wilkes is, that he " has been convicted in the court of " King's-Bench, of having printed and pub- " liſhed a ſeditious libel, and three obſcene " and impious libels."

To apply all that has been ſaid above to an expulſion grounded upon this article, it is only neceſſary to obſerve, that both the convictions here mentioned were prior to Mr. Wilkes's firſt election for the county of Middleſex.

This part of the charge is alſo liable to another objection, ſo far as it relates to the *ſeditious Libel*; for we have already ſhewn that the exerciſe of the Power of Expulſion, as of every other in a well-regulated ſtate, muſt be conſiſtent with the general Principles of the Laws and Conſtitution.

Now every body knows that it is a general Principle and fundamental Maxim of the Laws of England, that no man ſhall be twice puniſhed, by the ſame Judicature, for the ſame Offence.

Offence. The *ſeditious Libel*, of which Mr. Wilkes was convicted in the court of King's-Bench, was *the North Briton*, N°. 45. and Mr. Wilkes was *expelled* for writing that paper by the firſt Parliament of his preſent Majeſty, on the 19th of January 1764. Is a ſecond Expulſion therefore, for the ſame Offence, conſiſtent with the Principles of Law?

The next article in the vote of Expulſion of Mr. Wilkes is, that he is " in Execution un-" der the Judgment of the ſaid Court of " King's-Bench."

His being in execution under that judgment is clearly *no new crime*, nor *any addition* to thoſe before ſpecify'd, but ſimply the effect of them. It cannot therefore be conſidered as a Ground of Expulſion, unleſs it be in itſelf a legal Diſability.

This it clearly is not; for there is *no Statute* which diſables a perſon in execution from being elected or continuing a Member, *no immemorial Uſage* to incapacitate him by the Common Law.

The Uſage of Parliament itſelf, in this and ſimilar caſes, is directly contradictory to the idea of this being a legal Diſability; for there are numberleſs inſtances in the journals of perſons, under a temporary incapacity of attending, being ſtill conſidered as Members, and ſome of them, directly in point, being under execution. But, as this part of the caſe has never been much relied on, and has beſides

been

been fully anſwered in a very late * publication, I ſhall trouble my readers no farther upon this head.

As to the remaining article of the charge, the being the Author of the Preface to Lord Weymouth's celebrated Letter, as it was ſubſequent to Mr. Wilkes's firſt election, it does not come within the objections above ſtated, as infringing the Rights of the Electors, *if conſidered as a Ground of the firſt Expulſion only.* But that can have no weight in the preſent ſtate of the queſtion; for Mr. Wilkes *being re-elected after the cenſure* paſt upon that publication, thoſe objections apply with full force to this article as well as all the others, if conſidered as a ground of any of the proceedings of the Houſe *ſubſequent to that Re-election.*

Having ſtated theſe objections to the particular articles on which the firſt Expulſion of Mr. Wilkes in this Parliament was grounded, I ſhould next conſider the whole of them, taken together, *as one complicated charge*, but the objections to this have already been ſtated in ſo concluſive and maſterly a way, in the Speech of a Right Honorable Member of the Houſe, lately publiſhed, that I am incapable of adding any thing to the force of his reaſoning; the paſſage is long, but, as every word of it carries conviction, I have given it at large in the note, for the entertainment and inſtruction

* The Speech of a Right Honorable Member, printed for Almon. See page 24—29.

of thoſe who may not yet have read that excellent performance*.

We have now gone through with the vote of the 3d of March 1769, which was the firſt ſtep

* The charge contained in this motion conſiſts of four articles, each of which it has been contended is ſufficient ſingly to juſtify the concluſion drawn from them all put together, that Mr. Wilkes ought to be expelled. Upon this complicated charge, the Houſe is now called upon to give a judgment for or againſt the queſtion. It is a well known and undeniable rule in this Houſe, founded in common-ſenſe, that, whenever a queſtion, even of the moſt trivial nature, is complicated, and contains different branches, every individual Member has an indubitable right to have the queſtion ſeparated, that he may not be obliged to approve or diſapprove in the lump, but that every part of the propoſition ſhould ſtand or fall abſtractedly upon its own merits. I need not ſhew the propriety and the abſolute neceſſity for this; it is ſo ſelf-evident, that every argument I could urge in ſupport of it would only weaken it. And ſurely, if it holds good in all caſes where we act only in a deliberative capacity, it will not be contended that it is leſs true, or leſs neceſſary, when we are to exerciſe our judicial powers, when we are to cenſure and to puniſh, and to affect not only the Rights of our own Member, but the Franchiſes of thoſe who ſent him hither as their Repreſentative. I may ſafely challenge the gentlemen, the moſt knowing in the journals of this Houſe, to produce a ſingle precedent of a ſimilar nature: and if none ſhall be produced (as I am convinced there cannot) am I not founded in ſaying, that this is a new Attempt, unſupported by Law and Uſage of Parliament.

But this mode of proceeding is not only new and unprecedented, it is likewiſe dangerous and unjuſt. For the proof of it, let me recal to your minds what has paſſed in the courſe of this debate. One very learned and worthy gentleman, [Mr. Blackſtone] who ſpoke early, declared, that he gave his conſent to this motion for expulſion, upon that article of the charge alone which relates to the three obſcene

ſtep of the proceeding of the Houſe of Commons on the Middleſex Election. If the exerciſe of the Power of Expulſion in the Houſe, in this inſtance, has been proved to be neither

 con-

obſcene and impious libels, diſavowing, in the moſt direct terms, all the other articles, becauſe he thought that the libel relative to Lord Weymouth's letter was not properly and regularly brought before us, and that Mr. Wilkes, having been already expelled, by a former Parliament, for the ſeditious libel of the North-Briton, ought not to be puniſhed and expelled a ſecond time, by a ſubſequent Parliament, for the ſame offence: his argument was, that the former Houſe of Commons, having vindicated the honour of the King and of Parliament, he hoped this Houſe would not ſhew leſs zeal to vindicate the cauſe of God and of Religion: he ſpoke with a becoming zeal and indignation, raiſed, as he told us, by having read ſome of the wicked and impious expreſſions contained in the Record now upon your table. His opinions (which were ſoon after followed by another learned gentleman [Mr. Serjeant Nares] who adopted the ſame train of reaſoning) joined to the ſerious manner in which he delivered them, ſeemed to make great impreſſion upon the Houſe, and tho' I differ with him in his concluſion, yet I agree with him in his principles, and was glad to ſee this offence treated as it ought to be; for, if we treat it with mirth and levity, we in ſome meaſure juſtify the libel itſelf by our conduct, and ſhare the guilt of the author. On the other hand, what were the arguments of the two noble Lords [Lord Frederick Campbell, Lord Palmerſton] who ſpoke lately for the expulſion? They agreed indeed with the learned gentlemen in the concluſion, but differed widely in the premiſes, with regard to the articles of the charge on which they founded their judgment: they both diſclaimed the article of the three obſcene and impious libels as any ground for this proceeding: they expreſſed their diſapprobation of the manner in which the copy of them was obtained from Mr. Wilkes's ſervant, and their doubts with regard to his intention to publiſh them. One of them therefore deſired to draw a veil over

that

conſiſtent with the Principles of Law, nor with the legal rights of the Electors of this kingdom, that alone will furniſh a ſtrong objection to all the ſubſequent proceedings, which are *expreſsly founded* on that firſt Expulſion. But

that part of the charge, that it might no more be mentioned, and the other wiſhed to bury the whole of that tranſaction in oblivion. The firſt, waving the reſt of the charge, grounded his aſſent to the motion upon the ſeditious libel of the North-Briton; the latter, if I miſtake not, upon the libel againſt Lord Weymouth. Theſe ſentiments likewiſe ſeemed to meet with great approbation from many of your Members. Another gentleman [Mr. Dyſon] who is very converſant in the journals of the Houſe, and could not therefore but be ſenſible both of the novelty and danger of this proceeding, upon ſuch an accumulated and complicated charge, thought it neceſſary to take a different ground: he ſeemed to wave the criminal parts of the charge, but inſiſted ſtrongly upon Mr. Wilkes's incapacity of continuing a Member of Parliament, ariſing from his impriſonment, which the Houſe had declared to be no caſe of privilege, and from which they could not therefore diſcharge him.

I have ſtated theſe arguments, and I appeal to the Houſe whether I have miſrepreſented them. I might, in the ſame manner, go thro' the reſt of this debate: I think not above two gentlemen, who have ſpoken together, have agreed in aſſigning the ſame offence as the proper ground for this expulſion. It is impoſſible to form any judgment concerning the ſentiments of thoſe who have not ſpoken, except from thoſe who have, and from the approbation which has been given to what they declared. If I am to judge from thence, I ſhould imagine that the opinions of thoſe, who concur in this queſtion of expulſion, are almoſt equally divided among the ſeveral branches of the charge contained in it; but, however that may be, it is undeniably true, that great numbers of gentlemen approve of ſome parts of the charge, and diſapprove of others, and ſo, *vice verſâ*. What then may be the conſequence of blending the whole of

But waving this, let us go on to conſider thoſe proceedings in themſelves, and ſee whether they are not ſtill more irregular, more inconſiſtent with the Principles of the Conſtitution, and more ſubverſive of the Right of Election in

of this matter together? Is it not evident that, by this unworthy artifice, Mr. Wilkes may be expelled, although three parts in four of thoſe who expel him ſhould have declared againſt his expulſion upon every one of the articles contained in this charge? Would not this ſevere puniſhment be inflicted upon him, in that caſe, by a minority, againſt the ſenſe and judgment of a great majority of this Houſe? To explain this in a manner obvious to the apprehenſion of every gentleman who hears me, let me ſuppoſe that an indictment were framed, conſiſting of four diſtinct offences, each inferring the penalty of death, charging, for example, that the priſoner, on the firſt of May, had committed treaſon, on the firſt of June murther, on the firſt of July robbery, and on the firſt of Auguſt forgery. Let me ſuppoſe any court of judicature in the kingdom ignorant and wicked enough to admit of, and to try the priſoner upon ſuch a complicated indictment, notwithſtanding any objection he could make to it. Might he not be found guilty of each of theſe offences by three different jurymen, and declared innocent by nine, and would he not in fact, by this contrivance, be condemned to death by three, although acquitted by nine? What would mankind, what would you yourſelves ſay of ſuch a ſentence, ſo obtained? Would you not think the term of capital injuſtice too ſoft an expreſſion? Would you not call it the worſt of murthers, a murther under the colour of law and juſtice? The puniſhment would indeed be different, becauſe the offences are ſo, but the mode of proceeding, on the preſent occaſion, is exactly the ſame, and equally inconſiſtent with the law and uſage of parliament, with the practice of every court of judicature in any civilized country, and with the unalterable principles of natural equity. But I will reſtrain my expreſſions, and leave this part of the queſtion to your own feelings, which, I am perſuaded, will enforce it more ſtrongly than any arguments of mine.

in the People, than that on which we have already obſerved.

The grounds of Mr. Wilkes's expulſion being notified to the whole kingdom by the votes of the Houſe of Commons, his Conſtituents, nevertheleſs, ſtill thought him a proper perſon to be entruſted with their Rights; and accordingly he was unanimouſly re-elected.

Whether the judgment they formed upon this occaſion was right or wrong, is totally immaterial. In all probability many of them were actuated by a deſire of aſſerting thoſe Rights which they conceived to have been violated by an Expulſion, grounded upon ſome articles *on which the Electors had already paſſed their judgment*; and this is the more likely, becauſe many gentlemen voted for Mr. Wilkes on his ſecond election, who had not done ſo on the firſt. But be this as it will, the only queſtion now before the public is, Whether they had, by the eſtabliſhed Laws and Conſtitution of this kingdom, *a Right to do what they then did?* If they had, no power in this nation, how great ſoever, but the Legiſlature, could controul or abridge that *legal Right*.

We have already made ſome general obſervations on the Right of Election; we have ſeen that it is originally founded in the Common Law, and repeatedly recognized and confirmed by act of Parliament. It will now be neceſſary to be a little more particular, in regard to the extent and nature of that Right.

The

The Right of the Electors, originally *conſidered in itſelf*, was an abſolute Right of chuſing any perſon whatſoever whom they thought fit to repreſent them; but, as the exerciſe of every right muſt, in all regular governments, be conſiſtent with the principles of law, from hence aroſe ſeveral reſtrictions of the Right of Election, derived from the ſame ſource with that Right: I mean the Common Law. By that law perſons under certain circumſtances, ſuch as Aliens for inſtance, were held incapable of exerciſing any truſt or office whatſoever, or even of enjoying any franchiſe in this kingdom. Such perſons therefore could not, conſiſtently with any principles of law or reaſon, be elected to the moſt important of all truſts, that of acting as the Repreſentative of the Commons of the Realm, giving away their property, and making the laws by which they were to be governed.

From the ſame, or ſimilar principles, aroſe ſeveral common law diſqualifications, to which others have, from time to time, been added by ſtatute; " but ſubject to theſe reſtrictions " and diſqualifications, every ſubject of the " realm *is eligible of common right*." Black. Com. B. I. 170.

The right therefore of being elected, is as much a common-law right as that of electing; the one ſtands exactly on the ſame grounds, and is ſubject to the ſame rules, as the other. Indeed every diſqualification of the perſons to be elected, may properly and accurately be con-

conſidered as a reſtriction, in that inſtance, of the right of the Electors; for their right of voting for whom they pleaſe is, with regard to the perſon under that deſcription, taken away. Now both theſe rights, of electing and being elected, being common-law rights, it follows, by direct and neceſſary conſequence, that neither of them can be, in the leaſt degree, reſtrained, altered, or modified, *much leſs taken away*, by any authority leſs than that from whence they are derived.

The conſtitution of this kingdom knows no authority equal to the common-law, except that of the whole legiſlature, conſiſting of King, Lords and Commons. They, and they only, can abridge, alter or modify the natural or civil rights of the people of this realm; and they alone can change the laws which are once eſtabliſh'd, either by their own act or general immemorial uſage, in any the leaſt circumſtance whatſoever.

It has not been contended that Mr. Wilkes, at the time of any of his elections for the county of Middleſex, was under any Diſability by the Common or Statute Law; but it has been alledged, that having been once expelled by the Houſe of Commons, whether juſtly or unjuſtly, he was thereby rendered abſolutely incapable of being re-elected in the ſame Parliament. Purſuant to this idea, the Houſe of Commons, upon his re-election, *entirely drop the grounds of his expulſion* (well knowing that none of them amounted to a legal incapacity of being again elected)

elected) and reſolve, That " *having been ex-* " *pelled that Houſe*, he was, and is, incapable " of being elected to ſerve in the preſent Par- " liament."

It is difficult to conceive in what capacity the Houſe of Commons acted when they paſſed this reſolution; if in their deliberative and legiſlative capacity, the aſſent of the other two eſtates was clearly wanting to make their act compleat and obligatory; if in their judicial, we ſhall find this reſolution or declaration was altogether irregular, founded upon no law, and deſtitute of every requiſite to give it an authority binding upon the people of this realm. The deciſions of a court of juſtice, to have any authority, or affect the intereſts of any perſon whatſoever, muſt be made *in a cauſe depending before that court*, and *upon a full hearing of all the parties* having intereſt therein. Nothing is more common in courts of equity, than to refuſe proceeding upon a bill merely for want of parties; and if a decree is obtained upon a bill, defective in that particular, it is never held to be concluſive, as to the rights of thoſe parties who were not before the court.

Of ſtill leſs avail would a decree be, could we ſuppoſe it to have been made without any cauſe, or any parties at all before the court. Nothing is more univerſally underſtood among lawyers, than that an extra-judicial declaration of any court, however high its juriſdiction, and however able and learned the judges who preſide, is of little or no authority, and clearly

not concluſive, as to the right of any perſon whatſoever.

Suppoſe the court of King's-Bench, having given judgment of ouſter againſt the mayor of a corporation, and iſſued a writ of mandamus to proceed to a new election, ſhould, of their own mere motion, without any application to the court, call for the return to that writ, and, without hearing any of the parties, give a judgment upon that return, which materially affected the rights of the freemen or other members of that corporation; would any man in England think himſelf bound by ſuch a judgment?

Exactly of the ſame nature were the proceedings of the Houſe of Commons, in regard to the reſolution in queſtion. Upon Mr. Wilkes's ſecond election for the county of Middleſex, *without any cauſe depending before them*, without *any application from* any candidate, or from any one Freeholder of the county, they called for the return of the writ, and immediately, *without hearing, or even ſummoning, any of the parties intereſted*, proceeded to paſs a reſolution, which was not only to deprive Mr. Wilkes of his ſeat in Parliament, but materially to affect the rights of all the Freeholders of the county of Middleſex, who had been unanimous in his election; and which, by the expreſs words of it, was to have the force of a General Obligation on all the Electors of Great-Britain.

Could

Could any proceeding be more irregular, or any declaration or deciſion more truly extra-judicial than this?

The uſage of the Houſe itſelf in ſimilar caſes, I apprehend, will as little warrant ſuch a mode of proceeding as the principles of natural juſtice, or the practice of other courts; the regular parliamentary mode of determining the Rights of the Electors, or Elected, being *upon a hearing of the parties, brought on before the Houſe by a petition from ſome perſon having or claiming right:* and even the ſingle precedent of Mr. Walpole, which ſeems to have been relied on by the Houſe on this occaſion, fails them in this inſtance; for *that came regularly before the Houſe, by petition from the Freemen of Lynn.*

But ſuppoſing that the cauſe had been brought regularly before them, and that they had proceeded on a full hearing of the parties, would the Houſe of Commons have been warranted, by the laws and conſtitution of the kingdom, to make the declaration or judgment in queſtion?

That Houſe is confeſſedly the ſupreme court of judicature, in all matters immediately reſpecting the election of their own Members. Their juriſdiction has never been denied, tho' *a great deal of pains has been taken to prove it,* and much time and paper conſumed, for a purpoſe which ſhall be pointed out hereafter.

But the Houſe of Commons (as all courts in a free country, how tranſcendent ſoever their juriſdiction, muſt be) *is bound to determine*

thoſe matters which come judicially before them *according to the known eſtabliſhed rules of law, and not by mere diſcretion, or their own arbitrary will.*

" The diſcretion of Judges (ſaid a great " Judge * now at the head of the law) is the " law of tyrants; in the beſt, it is a field of " uncertainty and conjecture; in the worſt, " an inſtrument of revenge, malice and op- " preſſion."

A diſcretionary power is a thing ſo abhorrent to all ideas of civil liberty, and of the rights and privileges of mankind, that well conſtituted governments have hardly ventured to entruſt it with any one man, or even body of men, how great, how wiſe, how excellent ſoever.

In our happy conſtitution, this dangerous power is particularly guarded; it has not been truſted to the King, tho' the law ſays " that " he can do no wrong;" it has not been truſted to the Lords, notwithſtanding their exalted rank and high conſequence in the ſtate; it has not been truſted even to the Houſe of Commons, tho' it repreſents the whole body of the people; it has been truſted only to theſe three taken together, who form the legiſlative power.

The propoſition inferred in the reſolution of the 17th of February 1769, is this, " *That a* " *perſon expelled by a vote of the Houſe of* " Commons,

* Lord Cambden in the caſe of Doe (on the demiſe of Hindſon) againſt Kerſey, in the Common Pleas. Eaſter Term, 5 Geo. III.

" Commons, *independent of the grounds of* " *ſuch expulſion*, is, by that vote, rendered " abſolutely incapable of being again elected, " by any part of the kingdom, to ſerve in the " ſame Parliament." The miniſterial writers on the preſent queſtion have found themſelves under a neceſſity of endeavouring to ſupport this doctrine in its ſtricteſt ſenſe: one of the ableſt of them * ſays " The *neceſſary conſe-* " *quence* of Expulſion is, that the perſon ex- " pelled ſhall be incapable of being again " elected to ſerve in the ſame Houſe of Com- " mons that expelled him; this Incapacity is " implied in the very meaning of the word " itſelf. ——————— Expulſion clearly, " *ex vi termini*, ſignifies a total, and not a " partial, excluſion from the Society or Par- " liament from whence he is removed."

The ſame writer again, ſpeaking of the caſe of Mr. Walpole, ſays, " The very words of " the Reſolution, if they attend to them, " clearly import, that the Incapacity was " *created* by the Expulſion itſelf." †

This, if I miſtake not, is giving to the vote of expulſion, in itſelf, the force of law; it is, in direct terms, aſcribing to the Houſe of Commons, which is one branch only of the Legiſlature, the power of *creating a legal Diſability*, of reſtricting the Right which the Electors had before to vote for that perſon, if they choſe it, and

* The Caſe of the late Election for the County of Middleſex conſidered, pag. 9. † Pag. 11.

and conſequently of altering the eſtabliſhed laws of the land.

If any man, after this propoſition has been thus, I hope fairly, ſtated, entertains a doubt of the abſurdity and falſity of it, let him attend, upon this point, to the concurrent authority of the greateſt and moſt learned of our judges, The ſupreme court of judicature in this kingdom, and the legiſlature itſelf.

Lord Chief Juſtice Holt (whom no lover of the conſtitution can ever mention without reverence) in the caſe of the Ayleſbury-men, expreſſes himſelf thus,*

" It doth highly concern the people of " England, *not to be bound by a Declaration of* " *the Houſe of Commons, in a Matter which* " *before was lawful.*" And again, " *Neither* " *Houſe* of Parliament has a power ſeparately " to diſpoſe of the Liberty or Property of the " People, for that can't be done but by the " Queen, Lords and Commons; and this is " the ſecurity of our Engliſh Conſtitution, " which cannot be altered but by Act of " Parliament." And a little lower in the ſame page, " No Privilege of Parliament can " intend ſo far as to deſtroy a man's Right."

My Lord Coke, in his fourth Inſtitute, where he expreſsly treats of the authority and juriſdiction of Parliament, defines an ordinance of Parliament to be " an act of one or two " branches of the Legiſlature."† And afterwards, ſpeaking of the ordinance of 46th of Edward

* State Tryals, Vol. 8. p. 161. † 4th Inſt. 25.

Edward III. declares *directly in point*, That " *He which is eligible of common Right, cannot* " *be diſabled by the ſaid ordinance in Parlia-* " *ment, unleſs it had been by Act of Parlia-* " *ment.*"*

The Houſe of Lords is the ſupreme court of judicature in this kingdom, and has an equal ſhare in the Legiſlature with the Houſe of Commons.

After that Houſe had given judgment in the great caſe of Aſhby and White, which came before them on a writ of error in the 2d and 3d years of Queen Anne, they appointed a committee to draw up a report of the caſe, with the reaſons of the judgment, which was afterwards, on the 27th of March 1704, approved by the Houſe, and ordered to be publiſhed. In it they declare, That

" A man has a Right to his Freehold by " the Common-Law, and the Law having " annexed his Right of voting to his Freehold, " it is of the nature of his Freehold, and muſt " depend upon it. The ſame Law that gives " him his Right muſt defend it for him, and " any other power that will pretend to take " away his Right of Voting, may as well pre- " tend to take away the Freehold upon which " it depends."‡ And again,

" *It is abſurd to ſay, the Electors Right of* " *Chuſing is founded upon the Law and Cuſtom* " *of Parliament*; it is an original Right,

" Part

* 4th Inſt. 48.

‡ State Tryals, Vol 8. p. 131.

" Part of the Conſtitution of the Kingdom, as " much as a Parliament is, and from whence " the perſons elected to ſerve in Parliament do " derive their Authority, and can have no " other but that which is given to them by " thoſe that have the original Right to chuſe " them"* and " That certainly can never be " eſteemed a Privilege of Parliament that is " incompatible with the Rights of the Peo- " ple."† And here they apply to this purpoſe the ſtatute of Magna Charta, ch. 29. " That " no Freeman ſhall be diſſeiſed of his Free- " hold, or Liberties, or free Cuſtoms, unleſs " by the lawful Judgment of his Peers, or by " the Law of the Land."

The ſame glorious and conſtitutional Doctrine is farther purſued by the Houſe of Lords, in the account of the grounds of their proceedings in the caſe of the Ayleſbury-men, preſented by them to the Queen, in the form of a Remonſtrance or Addreſs.

‡" It was never yet heard (ſay they) when " there was a Houſe of Lords in being, and a " King or Queen upon the throne, that the " Houſe of Commons alone claimed a power, " by any declaration of theirs, to alter the " Law, or to reſtrain the people of England " from taking the Benefit of it."—

" If they have ſuch a power in any caſe, " they may apply it to all caſes as they pleaſe; " for when the Law is no longer the Meaſure, " Will and Pleaſure will be the only Rule."

" The

* State Tryals, Vol. 8. p. 133. † ib. ‡ ib. 164.

" The certainty of our laws is that which " makes the chief felicity of Engliſhmen; " but, if the Houſe of Commons can alter " the laws by their declarations—we ſhall " have no longer reaſon to boaſt of that part " of our conſtitution."

*" Your Majeſty's royal writ commands, " that the ſeveral Electors make choice of per- " ſons to repreſent them in Parliament, in " order to do and conſent to ſuch things as " ſhall be ordained there, relating to the ſtate " and defence of the kingdom and the church, " for which the Parliament is called, and they " obey the command, in proceeding to chuſe " Members for the Parliament then ſum- " moned; but neither the writ which requires " them to chuſe, nor the indenture by which " the return is made, import any thing where- " by it may be inferred, that the Electors put " into the power of their Repreſentatives their " ſeveral Rights of Election, to be finally " diſpoſed of at their Pleaſure."

To theſe great and reſpectable authorities I ſhall add one more, which is ſtill greater; I mean that of the whole Legiſlature, who declared in the ſtatute of 13 Car. II. ch. 1. " That " there is no legiſlative power, in either or " both Houſes of Parliament, without the " King."

Beſides theſe authorities, which put it out of all doubt that the Houſe of Commons, conſidered as a ſeparate body, have no legiſlative

* State Tryals, Vol. 8. p. 164.

authority in any caſe whatſoever, there is a very ſtrong reaſon why they ſhould not have it, more particularly in regard to the Election of their own Members; becauſe, in matters reſpecting them, they are confeſſedly the ſupreme Judges, and have an immediate Power of carrying into execution their own Deciſions. If therefore to this was added a legiſlative authority, they would have the power at once of making, interpreting and enforcing the laws.

Upon this point, I cannot avoid taking notice of the very remarkable words of that ingenious, learned, and judicious Commentator on the laws of England,* who, in the firſt Book of his valuable Commentary, p. 142, expreſſes himſelf thus.

" In all *tyrannical* governments, the Right, " both of making and enforcing the laws, is " veſted in one and the ſame man, *or one and* " *the ſame body of men*; and wherever theſe " two powers are united together, there can " be no public liberty."

It has now been, I hope fully, proved, from the fundamental principles of the conſtitution of this kingdom, ſupported by the moſt reſpectable and unqueſtionable authorities, and amongſt the reſt, by that of the Legiſlature itſelf,† that there neither in fact does, nor in reaſon ought to, exiſt, a legiſlative authority in the Houſe of Commons, in any caſe whatſoever, but more eſpecially in regard to the Election of their own Members.

It

* Dr Blackſtone. † Stat. 13 Car. II. vid. ant. p. 41.

It is ſelf-evident, that aſcribing to that H uſe the power either of *creating a legal diſability by their vote*, or of *declaring that to be law which was not ſo prior to their declaration*, is giving that vote or declaration a legiſlative authority.

If this be true the concluſion is inevitable, that the Houſe of Commons cannot legally do either the one or the other of theſe, and that the preſent Houſe of Commons, creating an incapacity by one vote, and declaring it to be law by another, have, by their own authority, doubly infringed thoſe Rights of the People which are derived from the Common-Law, taking away from Mr. Wilkes the *Right of being elected*, and from the Electors *the Right of chuſing him* if they thought proper.

An attempt has been made to evade the force of this reaſoning, by alledging that the Right of being elected was a *parliamentary*, and not a Common-Law Right. I ſhall not here repeat the arguments and authorities which have been already adduced to prove this Right derived from the Common-Law *; I ſhall only obſerve, that the ſole reaſon which has been alledged in ſupport of this aſſertion (by a very able and artful writer already mentioned) fails in point of fact. It is ſaid by him to be a *parliamentary Right*, becauſe it is "to be "*exerciſed only in Parliament*, and therefore "cognizable there only, where the duty is to "be executed."†

* See pag. 16, 17, 30 and 31.

† The Caſe of the late Election, &c. p. 28.

I never heard before, that the *right of being elected* was to be exerciſed *in Parliament*; the rights *conſequent* upon being elected indeed are to be exerciſed there, but not the right of being elected itſelf, unleſs the election is to be made in Parliament, which would indeed be the conſequence of that writer's ſyſtem, ſhould it prevail; and in that caſe I entirely agree with him, that the Right of being elected, and that of electing too, would very ſoon "*be* "*exerciſed only in Parliament.*"

But the principal argument which has been relied on in ſupport of the proceedings of the Houſe of Commons is this, That a perſon expelled is, ipſo facto, independent of the grounds of that expulſion, abſolutely incapable of being again elected in the ſame Parliament, *by the law and uſage of Parliament*, and that, by that law, the Houſe, in its judicial capacity, was in the preſent inſtance warranted to declare, "that "Mr. Wilkes, *having been expelled, was, and* "*is, incapable of being elected*, &c."

All the arguments which have already been drawn from the fundamental principles of the laws and conſtitution of the kingdom, might be here applied; and it might well be contended, that no length of time could eſtabliſh a uſage which gave to a vote of the Houſe of Commons an authority ſubverſive of thoſe principles. Lord Mansfield, in giving his opinion upon General Warrants ſaid, "Uſage "has undoubtedly great force, but not where "evidently

" evidently contrary to every principle of " law." *

We might argue, that the rights both of electing and being elected, were, in their very nature, prior to the uſage contended for, tho' it had been coëval with the Houſe of Commons itſelf; for the Houſe of Commons never could have exiſted, if there had not been a prior right in the people both of electing and being elected; and therefore that, wherever they are incompatible, *the ſubſequent Uſage* muſt give way to the *prior Right*, and the *derivative Authority* to that *by which it was created.*

Theſe arguments are undoubtely true, and upon them we might reſt the cauſe if we were afraid to encounter the precedents; but that we may not ſeem to decline the conteſt with any weapons, we will enter, with the advocates for the incapacity, into the law and uſage of Parliament, and ſhew that the proceedings in queſtion can no more be ſupported upon that ground, than upon the principles of the general laws and conſtitution of the kingdom.

The law and uſage of Parliament is undoubtedly part of the law of the land, it is part of the common-law, and derives its authority from the ſame ſources with the general cuſtomary law of England; but to have the ſame force, operation and extent of the general eſtabliſhed common-law of this kingdom, it muſt have

* Trinity Term, 5 Geo. III. in the caſe of Mony and others againſt Leach, upon a writ of error in the King's-Bench.

have all the properties which are to be found in that law, and from whence that law derives its authority; like that law, it muſt be reaſonable in its commencement, it muſt be uninterrupted, it muſt be from time beyond memory of man. I ſpeak now of ſuch a uſage as is to be conſidered as part of the law of the land, as capable of affecting the rights of the people at large; for as to thoſe rules and orders which reſpect only the Members of either Houſe of Parliament, and are to operate only within the walls of that Houſe, tho' they too may be called the law and uſage of Parliament, it is not neceſſary here to conſider them.

If there is any uſage of Parliament which can be applied to the preſent queſtion, it muſt be of the nature above-mentioned, that is to ſay, coëxtenſive with the Common-Law, and capable of affecting the Rights of the People at large; for we have already ſeen, that every diſqualification of the perſons to be elected, is a reſtriction of the Right of the Electors.

Let us then ſee whether there is any immemorial and uninterrupted uſage which can ſupport the declaration of the Houſe of Commons, that "a perſon expelled is thereby rendered "incapable of being elected to ſerve in the "ſame Parliament."

Many precedents, of different kinds, have been cited in ſupport of this propoſition; we will endeavour to obſerve upon and give anſwers to them all, ranging them in diſtinct claſſes.

The

The firſt ſet of caſes are thoſe of ſimple expulſions, where the Houſe of Commons have expelled the Member, without doing or ſaying more, and nothing farther appears about it. Of theſe caſes many have been, and many more might have been cited, the inſtances in the journals being very numerous. But as to all theſe, they are totally foreign to the preſent queſtion; for they only prove the *exerciſe* of the power of expulſion, and do not afford the leaſt inference as to the effect of it, one way or the other.

The next ſet of caſes ſeem to come ſomewhat nearer the point; but ſo far are they from concluding for the propoſition, " that the ex-" pulſion is in itſelf a legal incapacity," that, as far as their authority goes, they prove the direct contrary. Theſe are the caſes where the Houſe has not only expelled the Member, but in the ſame, or a ſubſequent reſolution, declared him incapable or diſabled from ſerving in the ſame Parliament.

From theſe caſes it appears evident, that the Houſe of Commons, at thoſe times, did not conſider a vote of expulſion, in itſelf, as carrying with it an actual legal incapacity to be again elected; for had they conſidered it in that light, it was abſolutely unneceſſary to add that in the latter part of the ſentence which was neceſſarily implied in the former, and the doing ſo was an act ſo nugatory and abſurd as cannot be imputed to the wiſdom of the Houſe of Commons.

The

The firſt and only caſe before the preſent one, in which the Houſe of Commons declared, in their judicial capacity, that a perſon expelled was therefore incapable of being elected, is that of Mr. Walpole, and even that ſingle precedent does not come up to the doctrine now contended for; for the reſolution in that caſe was * "That Robert Walpole, Eſq; "having been, this ſeſſion of Parliament, "*committed a priſoner to the Tower of London*, "and expelled this Houſe, *for an high breach* "*of truſt in the execution of his office, and no-* "*torious corruption, when Secretary at War*, "was, and is, incapable of being elected a "Member to ſerve in the preſent Parliament."

From hence it appears that even that Houſe of Commons were doubtful of the doctrine which is now ſo confidently aſſerted, and would not venture to reſt the incapacity on the expulſion alone; they therefore threw in the other articles, which leave it uncertain whether they grounded their declaration on the expulſion *itſelf*, or the offence for which he was expelled, or the commitment to the Tower, or on all theſe taken together.

But the preſent Houſe of Commons go farther, and reſt the incapacity ſolely on the expulſion itſelf, for they entirely drop the grounds of the expulſion, and only reſolve, "That "John Wilkes, Eſq; having been, in this "ſeſſion of Parliament, *expelled this Houſe*, was,

* Journals, 6 Mar. 1711.

" was, and is, incapable of being elected a " Member to ſerve in this preſent Parliament."

Thus we ſee that there is far from being any immemorial and uninterrupted uſage of Parliament to ſupport the doctrine which is here declared to be law, againſt the fundamental Principles of the Conſtitution, and the undoubted legal Right of the Electors; ſo far from it, that one ſet of caſes which has been cited proves nothing one way or the other, another ſet infers the direct contrary, and the ſingle precedent which has been ſo much relied on falls ſhort in a moſt material inſtance.

Beſides theſe obſervations on the caſes that have been cited on the other ſide, there are ſeveral caſes of different kinds to be met with in the journals of the Houſe of Commons, which appear altogether incompatible with the doctrine we are now ſpeaking of.

At the head of theſe I ſhould certainly have cited thoſe caſes where the Houſe have added a diſabling clauſe to the ſentence of expulſion, tho' they had not been furniſhed by the advocates on the other ſide; and indeed they were firſt cited, at the bar of the Houſe of Commons, by one of the Counſel for the Freeholders of Middleſex. But it is unneceſſary to ſay any thing more upon them in this place, as they have already been obſerved upon.

And here, before I go any farther, it will be neceſſary to premiſe a general obſervation, which I ſhall have occaſion to apply more than

once in the remaining part of this publication and that is,

That wherever any body of men confeſſedly extend their authority beyond its legal bounds, all the precedents which are drawn from their proceedings, in ſupport of their authority, entirely loſe their weight, while, on the contrary, thoſe which are drawn from the ſame proceedings againſt their authority, acquire for the ſame reaſon a double force. This is particularly true of the Houſe of Commons in the Long Parliament, who avowedly aſſumed the powers of, and at length entirely ſwallowed up, the other branches of the Legiſlature. At the ſame time therefore that they claimed to themſelves an unbounded authority, they would hardly have permitted to be handed down to poſterity proceedings which *appeared* to them ſubverſive of even the legal rights of their own body.

In the journals of that Parliament we find the following caſes, which afford the ſtrongeſt preſumption of Members expelled being re-elected in the ſame Parliament.

10 Aug. 1642, *John Griffith*, Member for *Beaumaris* in Angleſea, was expelled, or (according to the ſtile of the Long Parliament) *diſabled* from being a Member of Parliament.

8 Dec. 1646. " Ordered, That Mr. Speaker " iſſue his warrant for making out a new writ " to elect a Burgeſs for *Beaumaris*, in the " room of *John Griffith, Eſq*; formerly choſen

" to

" to ſerve for the ſaid borough, and *ſithence* " *deceaſed.*"

This being the ſame name, and Member for the ſame place, with him who was *diſabled* in 1642, there is the ſtrongeſt preſumption that he had been re-elected, and not expelled ſince his laſt election, for, had he been expelled ſince his election, it would have been taken notice of in the order, as appears clearly by the very next reſolution in the journals, which is,

" That a warrant be iſſued—for a writ— " for the election of two Burgeſſes to ſerve " for the borough of Leſtwithiel, in the places " of *Richard Arundell* and *John Trevanian*, " formerly choſen—and *diſabled*, by judgment " of this Houſe, to ſerve any longer during " this Parliament, and the ſaid *John Trevanian* " *ſithence deceaſed.*" Here notice is taken of Trevanian's expulſion being ſubſequent to his election, tho' he was ſince deceaſed; and the ſame ſtile is uſed in all caſes of the ſame nature, without exception.

5th Feb. 1643, Sir William Portman, Member for Taunton in Somerſetſhire, is expelled.

25th Sept. 1645. A new writ is ordered (as in the former caſe) to elect a Burgeſs for Taunton, in the room of *Sir William Portman, deceaſed.*

This caſe is exactly the ſame with the former, and therefore affords the ſame inference.

11th Aug. 1642, *Sir William Pennyman*, Member for Richmond in Yorkſhire, is expelled; and a new writ ordered on the ſame day to elect a Member in the room of *Sir William Pennyman, diſabled*, &c.

25th Sept. 1645. A new writ ordered for Richmond, to elect a Member in the room of *Sir William Pennyman, deceaſed*, in the ſame words as in the former caſe, and no notice taken of his being diſabled.

The ſame inference ariſes here as in the two former caſes, and is farther ſtrengthened by the different expreſſions in the two orders.

11th Aug. 1642, *Mr. Robert Holborne, Member for Michell in Cornwall*, is diſabled, without any reaſon appearing upon the journals.

22d Jan. 1643. *Mr. Robert Holborne, Member for the ſame place*, with many others, is diſabled, "for deſerting the ſervice of the "Houſe, and being in the King's quarters, "and adhering to that party."

15th Mar. 1642. *Sir Patricius Curwen and Sir George Dalſton, Members for the county of Cumberland*, are diſabled, one for being "*very active in the Commiſſion of Array*," the other for "*ſending ſome horſes for the aid "and aſſiſtance of the ſaid Commiſsioners*,"

22d Jan. 1643. *Sir Patricius Curwen and Sir George Dalſton, Members for the ſame county*, are, with the above Mr. Holborne and many others, diſabled, "*for* deſerting the ſervice

" vice of the Houſe, and being in the King's " quarters, and adhering to that party."

6th Sept. 1642. *Sir Henry Slingſby, Member for Knaresborough, Yorkſhire,* with ſeveral others, is diſabled, " *for neglecting the* " *ſervice of the Houſe, and ſetting their hands* " *to a petition contrived in Yorkſhire, and ſent* " *up to the Parliament, in great diſhonour, and* " *to the ſcandal of the Parliament.*"

21ſt Jan. 1642. *Sir Henry Slingsby, Member for the ſame place,* and another, diſabled, " *for* " *having been in actual war againſt the Par-* " *liament.*"

The preſumption ariſing from theſe caſes is ſo ſtrong, for a re-election of theſe gentlemen after the firſt expulſion, that no argument or ſubterfuge whatſoever can evade it; the only one which has been attempted, in the caſes of Mr. Holborne and Sir William Pennyman, which were cited by Mr. Wedderburn in the Houſe of Commons,* is the ſuppoſition (founded on no one circumſtance whatſoever) " that they were different perſons of the ſame " name."

But to ſuppoſe that perſons of the very *ſame name and rank,*† ſhould, in every one of theſe caſes, have been elected for the *ſame place* in the room of the perſon expelled, is too groſs an inſult upon common-ſenſe, too far beyond the bounds of probability, to go down with any one man in the kingdom.

* On the 8th of May.

† Five out of the ſeven are Baronets:

I ſhall therefore take for granted, till I hear ſome better argument, that in all theſe caſes the expelled Member was re-elected. What then muſt become of the new-invented doctrine with regard to the effect of expulſion?

Had the Long Parliament ever entertained an idea that their *vote of expulſion or diſability** carried with it an abſolute legal incapacity of being again elected, and was of itſelf, by law, of force ſufficient to deprive the Electors of their Rights, would they have contented themſelves, at the time that they aſſumed and exerciſed a ſovereign authority, with merely repeating their ſentence in the ſame terms, without taking the leaſt notice of their former vote,† without paſſing any cenſure on the Electors, or even declaring the ſecond election void?

If we ſhould ſuppoſe that, in any of theſe caſes, the ſeat remained vacant from the time of the firſt expulſion, and that the ſecond was only an affirmance of it, the conduct of the Houſe would appear ſtill more weak and abſurd; for what proceeding could be more totally inconſiſtent with common-ſenſe, or more derogatory from their own dignity and authority, than to repeat in the very ſame terms, at a conſiderable diſtance of time, a ſentence which had already had its effect; an effect, according to the doctrine contended for, in its own

* In all theſe caſes they uſe the word *diſabled*.

† There is no notice taken of the former vote in any of the caſes here cited.

own nature as lasting as the Parliament itself? What could be more ridiculously nugatory, than to *expel* a man who was already *out of the House?*

But there is another observation arising from the two last cases, which absolutely excludes all possibility of supposing that the second expulsion was an affirmance of the first, or in any degree grounded upon it; for in them where the cause of each expulsion is distinctly expressed, that of the second expulsion is entirely different from that of the first. And it may also be worth observing, that the second offence, in both these cases, is of a much higher nature than the first, and indeed amounts to a legal disability, being, in the ideas of those times, nothing less than high treason.

The last case I shall trouble my readers with upon this head, is that of Mr. Woollaston. That case was purposely passed over in silence by the Counsel for the Freeholders of Middlesex, because they did not look upon it as in point, being clearly distinguishable from that of Mr. Wilkes in many material circumstances. Notwithstanding that, a great deal of pains has been taken to answer that case by two of the ministerial writers, * because they could not help seeing that it made against their favorite and fundamental doctrine, "that a per-"son *expelled* was thereby (independent of the "grounds

* See "Serious Considerations on a late important Decision," p. 22.—25.——And "The Case of the late Election for the County of Middlesex considered," p. 12.

" grounds of ſuch expulſion, rendered abſo-
" lutely incapable, by law, of being again
" elected." And indeed, as to this ſingle point, it applies moſt directly and ſtrongly.

The caſe of Mr. Woollaſton is this.

By the ſtat. 5th and 6th of Will. III. ch. 7. ſec. 57. it is enacted, " That no Member of
" the Houſe of Commons ſhall at any time be
" concerned, directly or indirectly, or any
" other in truſt for him, in the farming, col-
" lecting or managing any of the ſums of
" money, duties or other aids granted by this
" act, or that hereafter ſhall be granted by
" any other act of Parliament, except" certain perſons ſpecify'd.

20th Feb. 1698. It was reſolved, " That
" Richard Woollaſton, Eſq; being a Member
" of the Houſe of Commons, and having ſince
" been concerned and acted as a receiver of
" the duties, &c. contrary to the act made in
" the 5th and 6th of his Majeſty's reign, &c.
" *be expelled this Houſe*,"

A new writ was iſſued for the borough of Whitchurch, and Mr. Woollaſton, having reſigned the office which had been the cauſe of his expulſion, *was re-elected, and admitted to ſit in the ſame Parliament.*

In this caſe the Houſe did not (as has been endeavoured to be proved) ſimply declare the incapacity created by the ſtatute (in which indeed there are no expreſs words of incapacity, whatever may be the ſound conſtruction of it) but they did actually *expel* Mr. Woollaſton, as

appears

appears from the words of their own reſolution. And whatever their reaſons might be, it was clearly no inadvertence, for they proceeded in the ſame manner in every other caſe under that ſtatute.*

Now, if the *very vote of expulſion (independent of the grounds of it)* did, *in itſelf, neceſſarily* carry with it a *legal incapacity*, it is no anſwer to this caſe, to ſay "That the incapacity being in its nature only temporary, the cauſe being removed, Mr. Woollaſton was thereby *recapacitated*;" for, according to their doctrine, no ſubſequent act whatſoever, no removal of the cauſes upon which the expulſion was grounded, could remove the incapacity, which *muſt ariſe from the expulſion itſelf, independent of thoſe cauſes*, and muſt be in its nature *as durable as the Parliament in which he was expelled.*

But in Mr. Woollaſton's caſe the Houſe clearly did not conſider themſelves as bound by the vote of expulſion; they went into the grounds of ſuch expulſion; they conſidered the incapacity as ariſing from the act of parliament on which it was grounded, and therefore looked on themſelves *as bound to re-admit him* when that *legal* diſability was removed, *notwithſtanding the vote of expulſion.*

* See the caſes of James Iſaacſon, the 10th, Henry Corniſh, the 13th, and Sir Henry Furneſs and Samuel Atkinſon, the 14th of February 1698; and in the next Parliament, Sir Henry Furneſs, the 19th, and Gilbert Heathcott the 22d of February 1700.

We have now gone through the precedents upon this head, from whence I think it clearly appears that, inſtead of there being any law and uſage of Parliament which can eſtabliſh the Doctrine of Expulſion being in itſelf a legal Incapacity, that there is not one ſingle precedent * which fully comes up to it, in the extent it has been laid down, and that the weight of authorities afford an inference altogether incompatible with it. We ſhall now go on to conſider the ſubſequent proceedings on Mr. Wilkes's third and fourth election, and ſhew that they are as little to be ſupported, either upon the general law of the land, or the law and uſage of Parliament, as thoſe which have already been conſidered.

Mr. Wilkes being a third time unanimouſly elected, the Houſe on the day following † (proceeding in the *ſame extra-judicial way as before*) reſolved.

" That the election and return of John " Wilkes, Eſq; who hath been by this Houſe " *adjudged incapable* of being elected a Mem- " ber to ſerve in this preſent Parliament, are " null and void."

This reſolution being expreſsly founded on the foregoing proceedings, muſt undoubtedly ſtand or fall with them, and therefore all the arguments which have been uſed againſt them apply

* The caſe of Mr. Walpole has already been ſhewn not to come fully up to the preſent queſtion, and it will hereafter be conſidered in a different point of view.

† 17 Mar. 1769.

apply here, and I ſhall refer to them without entering into a tedious repetition.

But there are two arguments which have been uſed, which did not directly apply to or come under the forgoing heads, which may perhaps require to be taken ſome notice of.

It has been urged that, tho' the expulſion ſhould not in itſelf carry with it an abſolute diſability to be again elected, the *expreſs vote of incapacity* * neceſſarily muſt.

All the arguments which have been adduced from the principles of the Conſtitution, and all the authorities which have been cited as to the power of Legiſlation, apply exactly in the ſame manner to the vote of incapacity as to that of expulſion, if we conſider it *as creating a legal diſability*; and this application is ſo obvious, that it would be tedious and impertinent to point it more particularly out. It remains therefore only to ſee how this matter ſtands upon the law and uſage of Parliament, and whether there has been any *immemorial* and *uninterrupted* uſage to ſupport the exerciſe of this diſabling power in the Houſe.

The caſes on this head have already been obſerved upon under the foregoing one †; but we muſt now conſider them a little more particularly in a different point of view.

The firſt inſtance we meet with of theſe diſabling votes, is in the caſe of Arthur Hall, in 1580 ‡. From that time till 1628, in a

* 17 Feb. 1769. † See pag. 48. ‡ Feb. 14.

period of 48 years, we find no vote of incapacity, tho' ſeveral expulſions.

In that year, when every body knows that civil diſcord and the heat of party was beginning to riſe to that height which ſoon after covered the whole kingdom with blood and devaſtation, Sir Edmund Sawyer was expelled, and declared "unworthy *ever* to ſerve as a "Member of that Houſe."*

The next inſtance is in 1640, under an order againſt monopoliſts, which was clearly legiſlative†. From thence till 1660 (incluſive) we meet with a great number of theſe votes.

From the year 1660 till the preſent time, tho' there have been many expulſions, there is no vote of incapacity to be found, except the ſingle inſtance of Mr. Walpole.

Can it therefore be contended, that a uſage, thus recent in its commencement, thus interrupted in its exerciſe, and of which almoſt all the inſtances are taken from a period‡ when the Conſtitution was diſſolved, and the Houſe of Commons filled the place of every branch of the Government, exerciſing at once a *legiſlative*, a judicial, and an executive authority; can it, I ſay, be contended that ſuch an uſage has acquired a force ſufficient to alter the eſtabliſhed laws of the kingdom, and to ſtrip the Freeholders of that Right, which is as ſacred and inviolable as their Right to their Freehold itſelf.

But

* 21 Jan. 1628. † See Journals, 9th Nov. 21ſt Jan. and 2d Feb. 1640. ‡ Between 1640 and 1660.

But the words of the reſolution itſelf, in the preſent caſe, put this matter out of all doubt, and prove moſt clearly, that the Houſe did not conſider it as *creating* a legal incapacity, but merely as *declaring one which was ſuppoſed to exiſt before*; for the words are, "That Mr. Wilkes *was*, and is, incapable," which are obviouſly words of reference to *ſomething prior* from whence that incapacity aroſe.

It has been ſaid that the Houſe of Commons, being a court of judicature, and having juriſdiction in the matter in queſtion, have, incident thereto, a power of declaring the law on that matter, and having done ſo, their declaration muſt be binding.

The juriſdiction of the Houſe has already been admitted; but it has alſo been obſerved, that that juriſdiction muſt be exerciſed according to the rules of ſome known law, and not according to mere arbitrary will on the ſpur of a particular occaſion. The power of *declaring the law* is certainly incident to every court of judicature, but that power, in its very nature, neceſſarily ſuppoſes that the law muſt have exiſted prior to ſuch declaration, otherwiſe it is not *declaring* but *enacting* the law: the declaration (if they chuſe to call it ſo) is not judicial but legiſlative. Nor will the juriſdiction of the Houſe being, in this matter, *ſupreme* and without appeal, at all vary the caſe; it may indeed make the redreſs more difficult, but it cannot make the deciſion more lawful.

The

The Houſe of Lords have confeſſedly a ſupreme juriſdiction, without appeal, in all cauſes, ariſing from the common or ſtatute law, which come before them upon writ of error. Suppoſe a brother and ſiſter were each of them to claim the *fee-ſimple eſtate* of their father, who died inteſtate, and that judgment being given for the brother in the court of King's-Bench, and the cauſe brought before the Lords upon a writ of error, they ſhould reverſe that judgment, declaring the law to be, that eſtates in fee-ſimple ſhould deſcend to females in preference to males. Could ſuch a declaration and judgment ever be received as law, or cited as authority in any court of juſtice?

If the Houſe of Commons, in this caſe, claim an exemption from thoſe rules of law which bind all other courts, they muſt act in ſome other than their judicial capacity, which it has already been ſhewn they cannot do, without the concurrence of the other branches of the legiſlature.

No argument therefore can be drawn from the judicial power of the Houſe, till ſome prior law can be ſhewn, upon which their judgment was, or might have been grounded.

The Houſe of Commons having, by the foregoing reſolutions, by their own authority altered the law, with regard to elections, and added a new diſqualification unknown to the common law or conſtitution of the kingdom, and having thus reſtricted the Right of Election in

in the Freeholders, by declaring who *ſhould not be elected*, the next ſtep was eaſy and natural, To aſſume the exerciſe of that Right themſelves, and declare who *ſhould be elected.*

Accordingly, by the two next votes,* they declared, " That Henry Lawes Lutterell, Eſq; " *ought to have been returned*," and " that he " was *duly elected.*"

The grounds of this extraordinary determination appear in the votes of the 14th and 15th of April, when it was reſolved that Colonel Lutterell ought to have been returned.

They were, the former proceedings of the Houſe in regard to Mr. Wilkes, and the caſes of Serjeant Comyns at Malden, Mr. Ongley at Bedford, and Mr. Walpole at Lynn.

The caſe of Serjeant Comyns, 20th May 1715, ſo far as it relates to the preſent queſtion, was this.

There were four candidates at the election for the borough of Malden in Eſſex; the numbers were, for Serjeant Comyns 215, Mr. Bramſton 215, Mr. Tufnell 168, Sir William Jollyffe 128. The Houſe were againſt the Petitioners upon the Right of Election, but reſolved,

" That John Comyns, Serjeant at Law, " having, at the late election, &c. for the " borough of Malden, in the county of Eſſex, " wilfully *refuſed to take the oath of qualifica-* " *tion*, as is *directed by an act of* Parliament of " the *9th year of late Queen*, &c. tho' duly " required

* 15th April and 8th May, 1769.

" required ſo to do; and *not having, at any* " *time before the meeting of this Parliament,* " *taken the ſaid oath,* his election is *thereby* " void."

And upon this it was reſolved, " That " Mr. Bramſton and Mr. Tuffnell were duly " elected.

Mr. Ongley's caſe was this.

14th Feb. 1727. On petition touching the election for Bedford, the numbers on the poll were, for Samuel Ongley, Eſq; 465, James Metcalfe, Eſq; 462, John Orlebar, Eſq; 240, John Thurloe Brace, Eſq; 236.

16th April 1728. " It was objected, that " Mr. Ongley was, by an office in the Cuſ- " toms, diſabled to ſit, or claim to ſit, in " Parliament, &c."

" To which point of diſability the Counſel " on both ſides were heard, and the act 12 and " 13 Will. III. ch. 10. (againſt officers in the " Cuſtoms ſitting in Parliament) was read; " and no ſurrender of the ſaid office before the " election appearing, it was reſolved, &c.

" That Samuel Ongley, Eſq; having an of- " fice, touching collecting the Cuſtoms, at " the time of the election of Burgeſſes to ſerve " in this preſent Parliament for the town of " Bedford, &c. is incapable of claiming to ſit " in Parliament for the ſaid borough.

" The Counſel being acquainted with the " ſaid reſolution, they did admit, that Mr. " Orlebar and Mr. Metcalfe were duly elected."

" And accordingly it was reſolved that they " were duly elected."

The

The determinations of the Houſe in both theſe caſes were expreſsly grounded on the *legal diſability* of Serjeant Comyns and Mr. Ongley, at the time of their election, enacted and notified to the Electors by the expreſs words of the two acts of Parliament cited.

They do not therefore in the leaſt degree apply, unleſs it can be ſhewn that Mr. Wilkes, at the time of his election, was under ſuch an expreſs legal diſability as the Electors were bound by law to take notice of.

In that caſe it muſt be admitted, that the Electors, who thus wilfully acted contrary to a poſitive known law, would have thrown away their votes on a perſon incapable of being elected, and the next upon the poll would have been elected of courſe.

But it has been already ſhewn, that Mr. Wilkes was not under ſuch an incapacity at the time of any of his elections, neither the vote of expulſion, nor that of incapacity, having authority, by the laws and conſtitution of the kingnom, to create a diſqualification which ſhould be binding on all the Electors of Great-Britain.

This therefore affords a full anſwer to both thoſe caſes, without in the leaſt denying their authority.

The caſe of Mr. Walpole came before the Houſe on the 23d of February 1711, on a petition from the Freemen and Free-Burgeſſes of Lynn, ſetting forth, " That Samuel Tay-" lor, Eſq; was elected their Burgeſs, but

" John Bagg, Mayor of the ſaid borough, re-
" fuſed to return the ſaid Samuel Taylor, &c.
" and returned Robert Walpole, Eſq; though
" expelled this Houſe, and then a priſoner in
" the Tower."

On the 6th of March 1711, it was reſolved,
" That Robert Walpole, Eſq; having been,
" this ſeſſion of Parliament, committed a pri-
" ſoner to the Tower of London, and expelled
" this Houſe, for an high breach of truſt in
" the execution of his office, and notorious
" corruption, when Secretary at War, was,
" and is, incapable of being elected a Member
" to ſerve in this preſent Parliament."

" Then a motion being made, and the
" queſtion put, That Samuel Taylor, Eſq; *is*
" *duly elected*, &c. *it paſſed in the negative*,"
and the election was reſolved to be void.

This caſe has already been obſerved upon, conſidered as a precedent for the vote incapacitating Mr. Wilkes; but we are now to ſee it in a new light, as a ground of the reſolutions " That Colonel Lutterell *ought to have been* " *returned*," and " *was duly elected*." And, conſidered in this point of view, it not only does not come up to the caſe in queſtion, but is clearly in point *againſt* thoſe reſolutions.

For is not the *negative given to Mr. Taylor's election* the moſt convincing proof, that even that Houſe of Commons did not conſider the incapacity of Mr. Walpole as ſuch an abſolute legal diſqualification, as to ſtrip the Electors who voted

voted for him of their Right of Election, and transfer the whole Right of Repreſentation in the then Parliament to the minority who voted for Mr. Taylor? For, had they conſidered it in that light, why did they not do what the preſent Houſe of Commons has done? Why did they not declare *Mr. Taylor duly elected?*

The anſwer which has been attempted to be given to this caſe is ſhortly this, " That the Houſe were tender of depriving the Freemen of Lynn of ſo valuable a franchiſe as the Right of Election; that they thought it would be hard to enforce the rigour of the law in the firſt inſtance, and therefore choſe rather to act upon principles of equity, by giving them opportunity to proceed to another election."

This reaſoning is, in my apprehenſion, an inſult both on that Houſe of Commons and on the preſent. It is an inſult on the preſent Houſe of Commons to ſuppoſe, that the Houſe which expelled Mr. Walpole would have been more tender of the rights and franchiſes of the Freemen of Lynn, than the preſent Houſe were of thoſe of the Freeholders of the firſt county in England, if their ideas of the law had been the ſame.

And it is equally an inſult to the then Houſe of Commons to alledge, that they, acting in a judicial capacity, ſhould ſport and trifle with the *ſtrict legal rights*, not only of Mr. Taylor, but of all the Freemen who voted for him, and ſtrip them of thoſe legal rights out of, I know not what, notions of equity, and tenderneſs

for thoſe who could not, as to that purpoſe, be ſaid to have any legal right at all, in the inſtance where they had exerciſed their franchiſe contrary to law.

Judges may, and often ought to be influenced by motives of lenity and tenderneſs, as far as is conſiſtent with public juſtice, in the exerciſe of their *criminal juriſdiction*; but I never yet heard that any court of juſtice, ſitting to determine a diſpute concerning a civil right between man and man, could give away the legal right of the one party, out of tenderneſs to the other.

Having now gone through all the proceedings of the Houſe in regard to the Middleſex Election, and the precedents on which they were grounded, it only remains to take notice of one fallacy which has been uſed, in order to ſupport them, by all the writers on the other ſide of the queſtion; which is an attempt to aſcribe all thoſe diſqualifications (which ariſe from common law, and are not created or confirmed by ſtatute) to the authority of *mere votes or reſolutions of the Houſe.*

This has been much laboured, and all the particular inſtances gone through, citing upon each of them reſolutions of the Houſe declaring them to be diſqualifications, and expreſsly alledging or ſtrongly inſinuating that there was no other law from whence they derived their force, but thoſe reſolutions of the Houſe.

It would be eaſy to follow them through the ſeveral inſtances, and to ſhew that all thoſe (not created by ſtatute) which have been generally acknowledged and received as diſqualifications, derive their authority from immemorial uſage, and the principles of the common law.

But as I have already taken up, I fear, too much of my readers time, I ſhall content myſelf with aſking one queſtion, which applies to all thoſe inſtances without exception.

Were they diſqualifications *before the firſt reſolution* of the Houſe, *which declared them to be ſo?*

I care not which way this queſtion is anſwered. If they were diſqualifications before the reſolution, they muſt have been ſo by the common law, and did not derive any new authority from that reſolution; in which caſe they afford no inference affecting the preſent queſtion, one way or the other.

If they were not diſqualifications before the reſolution, then the reſolution was not judicial and declaratory of any law which exiſted before, but legiſlative, and *creative of a new law*; which is an authority not veſted by the conſtitution in any one or two branches of the legiſlature.

This has already been, I flatter myſelf fully, proved, both by arguments and authorities; I ſhall now therefore only obſerve, that every act of Parliament, which has been made to create a diſqualification, is a proof of the ſenſe of

of the Houſe of Commons which paſſed that act, upon this head, and adds their authority to thoſe that have before been cited; for had they, at thoſe times, conceived that they could have created a diſqualification by the authority of their own reſolutions, they would never have ſubjected their privileges, and the rules reſpecting their elections (of which they have ever been moſt jealous) to the controul of the King and the Lords, by putting it in the form of a bill to which they might refuſe their aſſent.

The caſe of the Attorney-General alſo ſhews the ſenſe of the Houſe of Commons itſelf moſt clearly and ſtrongly upon this point.

For tho' there is a general reſolution * that no Attorney-General ſhall ſerve in Parliament, yet he, being *not diſqualified by the Law of the Land*, has been admitted, by the Houſe of Commons, to ſit in almoſt every Parliament ſince that reſolution.

I have now gone through the principal arguments that have occurred to me to ſupport the Rights of the Electors of Great-Britain, and to ſhew that thoſe Rights have been moſt eſſentially violated by the late proceedings of the Houſe of Commons. Many more might, I dare ſay, have been urged, and others more ſtrongly enforced; but as I hope, on ſo great a queſtion, ſome much abler hand may take it up, and ſupply thoſe deficiencies, I do not think it neceſſary to retard this publication, or add

* 11th April 1614.

add to the bulk of it, by any farther argument at this time.

Should I ever be called upon to explain or ſupport any thing I have already advanced, I am ready to do it as well as I am able, and to contribute every thing in my power to the elucidation of this moſt important queſtion: a queſtion which, in my apprehenſion, moſt deeply affects the liberty and ſecurity of every individual in this kingdom, and the very being of the conſtitution itſelf.

I ſhould be ſorry, in any thing I have ſaid, to be thought wanting in reſpect for the dignity and juſt authority of the Houſe of Commons. Far be it from me to attempt to derogate from the conſtitutional powers, or legal rights, of the Repreſentatives of the People; as one of the people repreſented, I am more immediately concerned in intereſt to ſupport their rights and powers, than thoſe of any other branch of the conſtitution: as long as my right of chuſing thoſe Repreſentatives remains, their rights are my rights, their power and authority is mine. But God forbid that the power, even of the people themſelves, ſhould ever become ſo overgrown a monſter, as to ſwallow up every other power in the ſtate, and deſtroy that balance which is the ſecurity and excellence of our happy conſtitution! And God forbid that the Repreſentatives of the People ſhould ever eſtabliſh a ſeparate intereſt from that of their conſtituents,

and

and render themſelves independent of their original *creators!*

Should the Houſe of Commons in fact be poſſeſſed of the power (which has in this caſe been contended for) of declaring that to be law which is to be found no where but in their own declarations, and, by that means, of making and unmaking the laws which are to regulate elections, according to their mere will and pleaſure, on the ſpur of each particular occaſion, it is obvious to the meaneſt capacity, and is what we have in fact ſeen in the preſent inſtance, that they would have a power not only of rejecting, but of bringing in, whom they thought proper.

They would then be, to all intents and purpoſes, the electors of themſelves, and that which is now the *popular* part of our conſtitution would be changed into an ariſtocracy, the moſt deſpotic and worſt conſtituted that could be imagined.

I ſhall cloſe this ſubject with the words of, perhaps, the greateſt politician that ever wrote*. "The Senators (ſays he) ought by no means to "have a Right of naming their own Members; "for this would be the ſureſt way to perpetuate "abuſes."

* Monteſquieu Spi. of Laws, B. II. ch. 3.

FINIS.